Office-Supreme Court, U.S.
FILED
MAR 23 1983
ALEXANDER L. STEVAS,

NO. 82-1088

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ROBERT L. GUMM, d/b/a DESERT-AIRE MOBILE HOME STYLING AND SALES, INC. AND BOB'S MOBILE HOME SALES,
Petitioner,

v.

J. O. TURNER AND FERN LOUISE TURNER,
Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

EDWARD W. DUNBAR
MICHAEL C. CROWLEY
1808 State National Plaza
El Paso, Texas 79901
915/532-3638

Attorneys for Respondents

Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

QUESTIONS PRESENTED

The questions presented involve the application of the federal Truth In Lending Act, 15 U.S.C. § 1601 *et seq.*, and the Texas Consumer Credit Code, TEX. REV. CIV. STAT. ANN. Art. 5069-1.01 *et seq.*, as both statutes were in force and effect in 1974. Subsequent amendment to the Texas Consumer Credit Code now disallows the recovery awarded against Petitioner. TEX. REV. CIV. STAT. ANN. Art. 5069-8.01(h) (Supp. 1982).

(1) Whether the trial court erred in imposing the statutory penalties arising under both the Truth In Lending Act and the Texas Consumer Credit Code for multiple acts of misconduct.

(2) Whether the trial court erred in holding that the choice-of-law provision was violative of the Texas Consumer Credit Code, and, therefore, invalid.

(3) Whether the trial court erred in finding that Petitioner was a creditor as defined by the Truth In Lending Act, 15 U.S.C. § 1602(f) and 12 C.F.R. § 226.2(s).

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	1
TABLE OF CONTENTS	II
TABLE OF AUTHORITIES	III
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	4
REASONS FOR DENYING THE PETITION	8
I. The Imposition of Statutory Penalties Arising Under Both the Truth In Lending Act and The Texas Consumer Credit Code for Multiple Acts of Misconduct Involves Neither an Important Federal Question Nor the Need to Determine Congressional Intent	8
II. The Judicial Refusal to Give Effect to the Choice-of-Law Provision of the Subject Contract Correctly Enforced the Texas Consumer Credit Code	13
III. The Defendant Was a Creditor as Defined Under the Truth In Lending Act and Its Corresponding Regulations	17
CONCLUSION	22
CERTIFICATE OF SERVICE	23
APPENDIX	D-1

TABLE OF AUTHORITIES

CASES	Page
Baron v. Mullinax, Wells, Mauzy & Baab, Inc., 623 S.W.2d 457 (Tex. Civ. App.—Texarkana 1981, writ ref. n.r.e.)	14
Cantrell v. First National Bank of Euless, 560 S.W.2d 721 (Tex. Civ. App.—Ft. Worth 1977, writ ref. n.r.e.)	10
Ford Motor Credit Co. v. Blocker, 558 S.W.2d 493 (Tex. Civ. App.—El Paso 1977, writ ref. n.r.e.)	9, 10
Hagans v. Levine, 415 U.S. 528 (1974)	7
Lewis v. Davis, 145 Tex. 468, 199 S.W.2d 146 (1947)	14
McDonald v. Savoy, 501 S.W.2d 400 (Tex. Civ. App.—San Antonio 1973, no writ)	10
Meyers v. Clearview Dodge Sales, Inc., 539 F.2d 511 (5th Cir. 1976) *cert. den.* 431 U.S. 929 (1977)	4, 5, 21
Mourning v. Family Publications Service, Inc., 411 U.S. 356 (1973)	8
New State Ice Co. v. Liebmann, 285 U.S. 262 (1932)	10
O. R. Mitchell Motors, Inc. v. Bell, 528 S.W.2d 856 (Tex. Civ. App.—San Antonio 1974, writ ref. n.r.e.)	16
Southwestern Ins. Co. v. Mannix, 557 S.W.2d 755 (Tex. 1977)	9
Sosa v. Fite, 465 F.2d 1227 (5th Cir. 1972)	9
United Mine Workers v. Gibbs, 383 U.S. 715 (1966)	7
Woods-Tucker Leasing Corp. v. Hutcheson-Ingram Development Co., 642 F.2d 744 (5th Cir. 1981)	14, 15, 16

CONSTITUTIONAL PROVISIONS	
U. S. CONST. art. I, § 8, cl. 3	8
U. S. CONST. art. VI, cl. 2	8

FEDERAL STATUTES	
15 U.S.C. § 1601 *et seq.*	*passim*
15 U.S.C. § 1602(f)	2, 7, 8, 17, 18
15 U.S.C. § 1605	11
15 U.S.C. § 1610	9
15 U.S.C. § 1633	9
15 U.S.C. § 1640	2, 3, 7
28 U.S.C. § 1254(1)	2

Page

FEDERAL REGULATIONS

12 C.F.R. § 226.2(f) 21
12 C.F.R. § 226.2(h) 21
12 C.F.R. § 226.2(k) 18
12 C.F.R. § 226.2(l) 18
12 C.F.R. § 226.2(m) 18
12 C.F.R. § 226.2(p) 18
12 C.F.R. § 226.2(s) 7, 18
12 C.F.R. § 226.2(jj) 18
12 C.F.R. § 226.2(q) 18
12 C.F.R. § 226.4(a)(6) 11
12 C.F.R. § 226.12 9
Interpretation § 226.404 11

STATE STATUTES

TEX. BUS. & COMM. CODE § 1.105(a) 14
TEX. BUS. & COMM. CODE § 9.105(2) 20
TEX. REV. CIV. STAT. ANN. Art. 5069-1.01 *et seq.* .. *passim*
TEX. REV. CIV. STAT. ANN. Art. 5069-6.01 ..... 7, 14, 22
TEX. REV. CIV. STAT. ANN. Art. 5069-6.02(3) 13
TEX. REV. CIV. STAT. ANN. Art. 5069-6.04(3) 12
TEX. REV. CIV. STAT. ANN. Art. 5069-6.04(5) 12
TEX. REV. CIV. STAT. ANN. Art. 5069-6.05(6) 12, 14, 15
TEX. REV. CIV. STAT. ANN. Art. 5069-8.01 ..... 3, 7, 9
Acts 1977, 65th Leg., p. 228, ch. 111, § 3 10

OTHER

Pederson & Cox, *Choice of Law and Usury Limits Under Texas Law and the National Bank Act*, 34 Sw. L. J. 755 (1980) 16
Weintraub, *Commentary On The Conflict Of Laws* (2d ed. 1980) 14
White & Summer, *Handbook Of The Law Under The Uniform Commercial Code* (2d ed. 1980) 14

NO. 82-1088

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ROBERT L. GUMM, d/b/a DESERT-AIRE MOBILE HOME STYLING AND SALES, INC. AND BOB'S MOBILE HOME SALES,
Petitioner,

v.

J. O. TURNER AND FERN LOUISE TURNER,
Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The judgment and opinion of the United States Court of Appeals for the Fifth Circuit, reported without opinion at 685 F.2d 1384 (1982), are set forth in Appendix A of the Petition for Writ of Certiorari previously filed by Robert L. Gumm, Defendant at the trial court and Petitioner herein. The judgment of the United States District Court for the Western District of Texas is set forth in Appendix B of said Petition. The Findings of Fact and Conclusions of Law of the District Court for the Western

District of Texas are set forth in Appendix C of said Petition. Central to the decisions of the courts below is the retail installment contract executed by the parties, reference to which is made in the Findings of Fact and Conclusions of Law as Plaintiffs' Exhibit 6 and 9. Exhibit 9 is the copy produced at trial by Petitioner, and is set forth in Appendix D, *infra*.

JURISDICTION

The judgment of the Court of Appeals was entered on August 27, 1982. Petition for rehearing was denied on September 30, 1982. The jurisdiction of this Court has been invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutes involved are the federal "Truth In Lending Act," 15 U.S.C. §§ 1601-1646, which although subsequently amended, provided in relevant part:

> § 1602(f).
>
> The term "creditor" refers only to creditors who regularly extend, or arrange for the extension of, credit which is payable by agreement in more than four installments or for which the payment of a finance charge is or may be required, whether in connection with loans, sales of property or services, or otherwise.
>
> § 1640(a).
>
> Except as otherwise provided in this section, any creditor who fails to comply with any requirement imposed under this part or part D or E of this subchapter with respect to any person is liable to such person in an amount equal to the sum of—

(1) any actual damage sustained by such person as a result of the failure;

(2) (A) (i) in the case of the individual action twice the amount of any finance charge in connection with the transaction, or (ii) in the case of an individual action relating to a consumer lease under Part E of this subchapter, 25 per centum of the total amount of monthly payments under the lease, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000; or

(B) in the case of a class action, such amount as the court may allow, except that as to each member of the class no minimum recovery shall be applicable, and the total recovery in such action shall not be more than the lesser of $500,000 or 1 per centum of the net worth of the creditor; and

(3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court.

The "Texas Consumer Credit Code," TEX. REV. CIV. STAT. ANN. Art. 5069-1.01 to 8.05, which although subsequently amended, provided in relevant part:

Art. 5069-8.01.

Any person who violates this Subtitle by contracting for, charging or receiving interest, time price differential or other charges which are greater than the amount authorized by this Subtitle, or by failing to perform any duty specifically imposed on him by any provision of this Subtitle, shall forfeit to the obligor

twice the amount of interest or time price differential and default and deferment charges contracted for, charged or received, and reasonable attorney's fees fixed by the court, provided that there shall be no penalty for violation which results from an accidental and bona fide error.

STATEMENT OF THE CASE

On November 1, 1974, Robert L. Gumm, doing business as Bob's Mobile Home Sales, executed a retail installment contract with J. O. and Fern Louise Turner for the purchase, on credit terms, of a mobile home. Suit was brought upon this contract on October 31, 1975.

Contrary to what Petitioner has argued in the courts below, and flatly reasserts in his Petition for Writ of Certiorari, the subject contract was by and between Mr. Gumm (hereinafter also referred to as "Defendant") and the Turners (hereinafter also referred to as "Plaintiffs"). The contract *was not* entered into by Plaintiffs and the Security National Bank of Roswell, New Mexico. The subject contract is not a loan agreement between Plaintiffs and the bank; it is a contract between Defendant as Seller and Plaintiffs as Buyers. The bank was the assignee of the contract between the parties, and neither the contract itself nor the record below can alter Defendant's position as an indispensable party to the agreement. Under no reading of the contract or the record can Defendant validly claim that he was not the seller, assignor and ultimately a creditor in the transaction with Plaintiffs.[1]

1. This is not to say that under the Truth In Lending Act's definition of "creditor" Security National Bank also could not have been adjudged as a creditor had it been joined as a party. See *Meyers v. Clearview Dodge, Sales, Inc.*, 539 F.2d 511, 514. (5th Cir. 1976) *cert. den.* 431 U.S. 929 (1977) which also contains a summary of how vehicle dealers arrange for the extension of credit by financial

Both Plaintiffs and Defendant are residents of the State of Texas, and both parties signed the contract in Texas. The mobile home was delivered to Plaintiffs in Texas, and the certificate of title was issued by the State of Texas. On November 7, 1974, according to the contract produced at trial by Defendant, Defendant assigned the contract to the Roswell, New Mexico bank. See Appendix D. No promissory note or other obligation ever was executed by the Plaintiffs in favor of the bank. The operative instrument in the case at bar is the retail installment contract of November 1, 1974, and it forms the only basis for any indebtedness. Defendant attempts to obscure his status, as a party to the contract, and a creditor, by claiming that the actual parties to the contract were Plaintiffs and the Roswell bank. This simply is not the case.

In the summer and fall of 1974 Defendant experienced difficulty in finding a lending institution which would purchase the obligation of Plaintiffs. Defendant testified that during this time period he sold and assigned the retail contracts of his customers to Bassett National Bank of El Paso, Texas; Mutual Building & Loan of Las Cruces, New Mexico; and First State Savings & Loan of El Paso. He also maintained a business relationship with Delta Corporation of America, a mobile home service company, which assisted Defendant in selling his installment sales contracts to financial institutions. Initially, Mutual Building & Loan was thought to have been prepared to purchase the Plaintiffs' contract, and a form contract, acceptable to Mutual, was signed by Plaintiffs and Defendant.

---

institutions. One notable difference between the instant cause and the *Meyers* fact situation is that credit approval by the subsequent assignee was a condition to the *Meyers* transaction, while in the case at bar, the contract purported to be valid and binding on its face.

The failure of Mutual to purchase the contract caused considerable difficulty in that the mobile home already had been delivered to Plaintiffs. Defendant was obligated to extend credit under the Mutual contract, but either could not or would not perform. When the potential purchaser of the obligation refused to buy the installment contract, Petitioner and his service company sought other institutional purchasers. These sought-after institutions each had particular requirements, including the use of form contracts which Defendant as Seller and Plaintiffs as Buyers would be required to sign. As a result, Plaintiffs were asked to sign a variety of form contracts which presumably then were offered to various financial institutions by the mobile home service company assisting Defendant.

The record is unclear as to how many contracts were signed or what state law provisions were contained therein.

The desire to find a financial institution after the delivery of the mobile home led Defendant to execute and assign a retail installment contract which violated federal and state disclosure statutes. Texas disclosures were abandoned in the effort to locate an assignee. The Plaintiffs always assumed, and so testified, that the service company representative was from Bob's Mobile Homes. They had no understanding of the service company's role or the complex series of signings that Defendant caused them to undergo. They never met or discussed a loan with any New Mexico bank personnel. They merely signed what was placed in front of them in the hopes of keeping their mobile home. It is small wonder that the Fifth Circuit referred to the transaction as "a sticky deal." Appendix A-4.

The relationship which Defendant maintained with Delta Corporation of America was equally convoluted. Defendant claimed at trial that he received no participation fee from Delta, and that Delta later went out of business. As the trial court found, Defendant was entitled to receive such a fee upon assigning the contract, and in fact anticipated receiving the fee. Appendix C-5. Defendant's failure to receive this fee, for whatevr reason, cannot absolve him from being a creditor.

Defendant neither pled nor proved any *bona fide* error defense provided under the Truth In Lending Act, 15 U.S.C. § 1640, or the Texas Consumer Credit Code, TEX. REV. CIV. STAT. ANN. Art. 5069-8.01.

After trial on February 26, 1981, the court found that Defendant committed nine distinct violations of the statutes involved—two under the federal act and seven under the state code—and imposed the respective penalties authorized by each statute. Appendix C-5-7. The court found that Defendant was a "creditor" as defined by 15 U.S.C. § 1602(f) and 12 C.F.R. § 226.2(s), and a "retail seller" as defined by TEX. REV. CIV. STAT. ANN. Art. 5069-6.01(d). Pendent jurisdiction was exercised over the state claim under the authority of *United Mine Workers v. Gibbs,* 383 U.S. 715 (1966) and *Hagans v. Levine,* 415 U.S. 528, 550 (1974). Appendix C-4.

Plaintiffs were awarded judgment in the amount of $1,000 under federal law and $16,203.68 under state law, the latter being computed as "twice the amount of interest or time price differential". TEX. REV. CIV. STAT. ANN. Art. 5069-8.01. Appendix C-8. Attorney's fees were set at $9,360 under both the federal and state statutes. Appendix C-9.

The Fifth Circuit, *per curiam*, affirmed the trial court, finding Defendant to be a creditor under 15 U.S.C. § 1602(f) and rejecting Defendant's claim that recovery under both the federal and state law was impermissible. Appendix A-8.

REASONS FOR DENYING THE PETITION

I. THE IMPOSITION OF STATUTORY PENALTIES ARISING UNDER BOTH THE TRUTH IN LENDING ACTS AND THE TEXAS CONSUMER CREDIT CODE FOR MULTIPLE ACTS OF MISCONDUCT INVOLVES NEITHER AN IMPORTANT FEDERAL QUESTION NOR THE NEED TO DETERMINE CONGRESSIONAL INTENT.

A.

The courts below did not err in permitting the imposition of penalties under both state and federal law. The passage of the Truth In Lending Act and the promulgation of its corresponding regulations was an exercise of "the power granted to Congress under the Commerce Clause." *Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 379 (1973). Defendant does not argue that either the Commerce Clause, U.S. CONST. art. 1, § 8, cl. 3, or the Supremacy Clause, U.S. CONST. art. VI, cl. 2, are threatened by a state's passage of consumer protection laws for its citizenry. Nor does he argue that some procedural or substantive federal right is in need of protection.

Defendant points to the "unfortunate" fact that both the state and national governments "acted independently" of one another in extending protection to consumers, but

this, without more, does not rise to a federal question. Petition for Writ of Certiorari, 7-9. He speaks of Congress not intending dual recovery, yet Congress has done nothing to limit the states' various statutory schemes. Indeed, the Truth In Lending Simplification and Reform Act of 1980, Pub. L. No. 96-221, tit. VI, 94 Stat. 168 (1980) takes no action against state consumer protection laws.

Moreover, the Congress always has recognized that the Truth In Lending Act "does not annul, alter or affect, or exempt any creditor from complying with, the laws of any State relating to the disclosure of information in connection with credit transactions . . ." except to the extent state law is inconsistent with federal law. 15 U.S.C. § 1610 (1968). See also 15 U.S.C. § 1610 (1980). It would appear that any intent manifested by the Congress is inapposite to that inferred by Defendant.

The Congress, rather than foreclosing state action, has permitted the states to apply to the Federal Reserve Board for exmption of any class of transactions from the Truth In Lending Act. 15 U.S.C. § 1633; 12 C.F.R. § 226.12. The Fifth Circuit in *Sosa v. Fite*, 465 F.2d 1227 (5th Cir. 1972) held that the mere passage of a state act did not result in exemption, and only the Federal Reserve Board was empowered to grant an exemption. No exemption was granted to the State of Texas.

Texas courts continued to grant recovery under both the state and federal acts until the Texas Legislature limited recovery by amending the Code in 1977. TEX. REV. CIV. STAT. ANN. Art. 5069-8.01(h). See *Southwestern Ins. Co. v. Mannix*, 557 S.W.2d 755 (Tex. 1977); *Ford Motor Credit Co. v. Blocker*, 558 S.W.2d

493 (Tex. Civ. App.—El Paso 1977, writ ref. n.r.e.); *McDonald v. Savoy*, 501 S.W.2d 400 (Tex. Civ. App.—San Antonio 1973, no writ); *Cantrell v. First National Bank of Euless*, 560 S.W.2d 721 (Tex. Civ. App.—Ft. Worth 1977, writ ref. n.r.e.).

In limiting the application of penalties, the Texas Legislature expressly provided that the limitation would not apply to any pending action arising from a transaction entered into prior to July 1, 1976. Acts 1977, 65th Leg., p. 228, ch. 111 § 3. The case at bar involves such a transaction.

The Texas Legislature and the Federal Congress each have engaged in lawmaking which comports with basic federalism. The various states have exercised their residuary powers of regulation in a flexible manner, having been encouraged by a Congress which not only recognizes the right to so legislate, but which permits state exemption from the federal statutory scheme. Defendant argues that the relationship between state and federal consumer law must be "resolved," implying that some fundamental constitutional defect (which he cannot articulate) threatens the system. Yet the very strength of the federal system is to allow the states, within constitutional bounds, to regulate their affairs and to address local problems.[2]

---

2. The ability of the states to regulate consumer and credit affairs is reminiscent of Mr. Justice Brandeis' dissent in *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932):

> It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country. This Court has the power to prevent an experiment. We may strike down the statute which embodies it on the ground that, in our opinion, the measure is arbitrary, capricious, or unreasonable. We have power to do this, because the due process clause has been held by the Court

Congress is of the apparent opinion that consumer protection is a problem worthy of state concern, and has not placed any impediment to the states' exercise of this power.

The State of Texas allowed the dual imposition of penalties, but later withdrew this method of enforcing its regulation of consumer credit. Either approach is reasonable, and violates no federal constitutional precept. No federally protected right is in need of vindication in the case at bar.

B.

Defendant argues that a creditor regulated by the Truth In Lending Act and the Texas Consumer Credit Code will often, by the same conduct, violate both statutes. Double recovery, this argument goes, is unfair and unnecessarily punitive because the creditor engaged in only one act of misconduct. Petition for Writ of Certiorari, 7.

This argument is inapplicable to the conduct of Bob's Mobile Home Sales. Several misdeeds, each of which may be separately identified, were committed.

Defendant failed to include the cost of comprehensive physical damage insurance coverage in the finance charge thereby violating 15 U.S.C. § 1605 and 12 C.F.R. § 226.4(a)(6). Also not included in the finance charge was the cost of a separate type of insurance, Vendor's Single Interest insurance coverage. This inclusion violated 12 C.F.R. § 226.4(a)(6) and Interpretation § 226.404

---

applicable to matters of procedure. But, in the exercise of this high power, we must be ever on our guard, lest we erect our prejudices into legal principles. If we would guide by the light of reason, we must let our minds be bold.

in that the insurance company, in the case at hand, did not waive its subrogation rights.

Each insurance violation would support recovery under the Truth In Lending Act. In both of the Truth In Lending violations the separate insurance coverage was included in the "amount financed" rather than the "finance charge".

Some of the violations of the state code concerned insurance disclosure problems, but they are not identical, as Defendant suggests, to the federal violations. Defendant failed to clearly and conspicuously disclose that either the physical damage insurance or the Vendor's Single Interest insurance was required in connection with the transaction. TEX. REV. CIV. STAT. ANN. Art. 5069-6.04(3) and (5). Defendant failed to disclose that the physical damage insurance was sold at rates not fixed or approved by the Texas State Board of Insurance as required by TEX. REV. CIV. STAT. ANN. Art. 5069-6.04(3) and (5). The same state statutory provision was violated by failing to disclose the cost of the physical damage insurance.

The remaining state code violations are unrelated to insurance coverage. Defendant's contract provided for waiver of any claim against Seller based upon any unwritten modification of the contract. TEX. REV. CIV. STAT. ANN. Art. 5069-6.05(6). The retail installment agreement further provides for the waiver of any claim under the laws of Texas by requiring that the contract "shall be governed by the laws of the State of New Mexico." Appendix D. This term violates TEX. REV. CIV. STAT. ANN. Art. 5069-6.05(6).

The final violation is concerned with the Defendant's failure to deliver or mail to the Plaintiffs a signed copy

of the contract as required by TEX. REV. CIV. STAT. ANN. Art. 5069-6.02(3). Defendant, for reasons best known to himself, went to great lengths at trial to prove that Plaintiffs never received a signed copy of the contract. This trial strategy presumably was undertaken in the mistaken belief that the contract forwarded to the retail purchasers is not the instrument upon which a consumer suit is founded.

In summary, Defendant's premise that Congressional intent is in need of interpretation is unvalid. His view that an important federal question must be addressed by this Court is misplaced. Finally, his argument that the dual imposition of state and federal penalties leaves a creditor open to unnecessarily punitive fines does not mesh with the facts at hand.

II. THE JUDICIAL REFUSAL TO GIVE EFFECT TO THE CHOICE-OF-LAW PROVISION OF THE SUBJECT CONTRACT CORRECTLY ENFORCED THE TEXAS CONSUMER CREDIT CODE.

Defendant, in urging that Texas law be ignored, once again engages in the fiction that the subject contract was entered into between the New Mexico bank and Plaintiffs. Defendant's status as the Seller is explained away in this argument by claiming that Defendant entered into a separate contract of sale. A reading of the retail installment contract clearly establishes this "two contract" theory as incorrect. Appendix D.

In making his argument, Defendant refers to basic contract law regarding offer and acceptance, and cites the "reasonable relationship" test which governs the general

law of contracts. Weintraub, *Commentary on the Conflict of Laws*, § 7.3C (2d ed. 1980). See also the Uniform Commercial Code § 1-105(1) (1972); TEX. BUS. & COMM. CODE § 1.105(a) (hereinafter referred to as "Texas U.C.C."). Defendant embraces the proposition that the parties to a contract may designate which state's law will govern their agreement—a true statement, in and of itself, but inapplicable to a regulated consumer transaction.

Defendant ignores the Texas Consumer Credit Code and the express prohibition against waiver. TEX. REV. CIV. STAT. ANN. Art. 5069-6.05(6). While persons not engaging in a "consumer transaction," as defined by the Code, TEX. REV. CIV. STAT. ANN. Art. 5069-6.01, may include a choice of law provision, such a provision is unenforceable in a regulated transaction. The Texas Uniform Commercial Code, which permits choice of law clauses in normal commercial transactions, is overridden by Texas Consumer Credit Code. See White & Summers, *Handbook of the Law Under the Uniform Commercial Code* (2d ed. 1980), 7. The Consumer Credit Code forms a part of the "fundamental public policy of the State of Texas," *Woods-Tucker Leasing Corp. v. Hutcheson-Ingram*, 642 F.2d 744, 753 n. 13 (5th Cir. 1981) (hereinafter referred to as *"Woods-Tucker"*), and as such cannot be bartered away in a form contract. Texas courts have long recognized that the common law right to specify the place of performance may be overridden by public policy, *Baron v. Mullinax, Wells, Mauzy & Baab, Inc.*, 623 S.W.2d 457, 461 (Tex. Civ. App.—Texarkana 1981, writ ref. n.r.e.) citing *Lewis v. Davis*, 145 Tex. 468, 199 S.W.2d 146 (1947).

Woods-Tucker dealt with the contractual choice of the law of Mississippi in an agreement between a Texas partnership and a Mississippi corporation. The usury laws of Texas were more advantageous to the Texas debtor than were the laws of Mississippi, and the debtor, therefore, sought to avoid the agreed upon choice of law. The Fifth Circuit held that the parties were free to avoid the usury laws of Texas so long as there was a reasonable relation between the transaction and Mississippi, and, further, that the choice was not a contrivance to avoid Texas law.

Woods-Tucker involved merchants unregulated by the Consumer Credit Code. At issue was the application of the Texas usury laws which comprise Subtitle One of Title 79 of the Texas Revised Civil Statutes, TEX. REV. CIV. STAT. ANN. Art. 5069-1.01-1.08. This subtitle contains no express prohibition against waiver, unlike the Consumer Credit Code which comprises Subtitle Two of Title 79 of the Texas Revised Civil Statutes, TEX. REV. CIV. STAT. ANN. Art 5069-2.01-8.06, and does contain such a prohibition. TEX. REV. CIV. STAT. ANN. Art 5069-6.05. Given this prohibition it cannot be said that the Texas U.C.C. allows choice of law provisions in consumer contracts. Non-waiver is fundamental public policy. The entire purpose of the Consumer Credit Code would be subverted if lenders, assignees, and mobile home service companies, many of which are out of state corporations, could insert choice of law provisions in consumer contracts. A "reasonable relation" might well be established by the foreign domicile, the execution by the lender in its domicile, and payment by the borrower in the foreign jurisdiction. In short, it would not be difficult for regional or national lenders, assignees or service companies to satisfy the "reasonable relation" test. Perhaps,

it was just such a likelihood that caused the Texas Legislature to enact the non-waiver provision in the Consumer Credit Code. It also is perhaps why the Fifth Circuit favorably quoted the view that, given a reasonable relationship, a choice of law will be honored *provided* the choice is neither a contrivance nor in contravention of State public policy. *Woods-Tucker, supra* at 751, quoting Pederson & Cox, *Choice of Law and Usury Limits Under Texas Law and the National Bank Act,* 34 Sw. L. J. 755, 766 (1980).

Woods-Tucker also differs factually from the case at bar. The contracting parties in the case at hand are both Texans who signed the agreement in Texas to convey title to a mobile home. Title then was registered in Texas. Even Delta Corporation was a Texas corporation. The assignee was a New Mexico corporation, but the parties to the contract were Texas residents. The reasonable relation is not present in the instant cause, even if the fundamental public policy of Texas were absent.

In urging the adoption of the New Mexico disclosure laws to a Texas transaction, Defendant has made the additional argument that he didn't prepare the contract, and that this should absolve him from any liability arising thereunder. Defendant apparently seeks immunity by virtue of his status as user, not preparer, of the contract. *O. R. Mitchell Motors, Inc. v. Bell,* 528 S.W.2d 856 (Tex. Civ. App.—San Antonio 1974, writ ref'd. n.r.e.) effectively negates this position: the duty of compliance rests with the seller, even if the contract is not of its own preparation. Defendant has confused the literal meaning of "making a contract" (i.e., the actual act of physically creating the contract form) with execution of the contract

by the parties. Defendant has never denied he was an executing party to the contract, and, indeed, in his Brief acknowledges assignment of the same to the Security Bank. Assignment presupposes execution by a party to obtain a contractual right that may then be assigned.

III. THE DEFENDANT WAS A CREDITOR AS DEFINED UNDER THE TRUTH IN LENDING ACT AND ITS CORRESPONDING REGULATIONS.

Defendant's final argument for the granting of the writ of certiorari again attempts to remove Defendant from the ambit of the subject contract. His Petition states that his involvement was at best ministerial, and then goes on to suggest that he was "an uninvolved party." Petition for Writ of Certiorari, 15. He urges that he had no involvement with the New Mexico bank. Petition for Writ of Certiorari, 16. Plaintiffs would respectfully point out that Defendant is a "creditor" under the Truth In Lending Act. 15 U.S.C. § 1602(f) states that the term "creditor" refers to those ". . . who regularly extend, or arrange for the extension of credit for which the payment of a finance charge is required, whether in connection with loans, sales of property or services, or otherwise." As amended by Public Law 93-495 in 1974, effective upon the expiration of one year after October 28, 1974, the definition was to be as follows:

> "creditor" refers only to creditors who regularly extend, or arrange for the extension of, credit which is payable by agreement in more than four installments or for which payment of a finance charge is or may be required, whether in connection with laws, sales of property or service, or otherwise . . ."

12 C.F.R. 226.2(s) (1980)[3] defines *"creditor" as one "who in the ordinary course of business regularly extends or arranges for the extension of consumer credit* or offers to extend or arrange for the extension of such credit . . ."

12 C.F.R. § 226.2(p)[4] defines "consumer credit" as ". . . credit offered or extended to a natural person in which the . . . property . . . which is the subject of the transaction is primarily for personal, family, household or agricultural purposes . . ." 226.2(q)[5] defines "credit" as ". . . the right granted by a creditor to a consumer to . . . purchase property . . . and defer payment therefor . . ." 226.2(jj) requires that "[u]nless the context indicates otherwise, 'credit' shall be construed to mean 'consumer credit'."

Applying the definitions found in the statute and the regulations, it is clear Defendant ". . . in the ordinary course of business extended . . . consumer credit."

The trial court found that Plaintiffs purchased the Monte Carlo mobile home for personal, family and/or household purposes. Appendix C-2. Further testimony established that a Mr. Bob King contacted Plaintiffs on behalf of Defendant on several occasions with Defendant's paperwork, to be signed by Plaintiffs. Appendix C-3. A copy of the contract received by Plaintiffs in the mail was admitted into evidence. Appendix C-4. Defendant's testimony indicated he was and is in the mobile home

---

3. Formerly 12 C.F.R. § 226.2(m) (1975); see also, Truth In Lending Act, § 103(f), 15 U.S.C. § 1602(f) (1976).

4. Formerly 12 C.F.R. § 226.2(k).

5. Formerly 12 C.F.R. § 226.2(l).

business. He indicated he used retail installment contracts similar to the subject contract frequently in his business and sold the contracts as a matter of course to assignees. He was acquainted with and used Texas form contracts in his business.

The contract received by Plaintiffs recites that Plaintiffs are "Buyer (and Co-Buyer)." It indicates Seller is Defendant. It indicates a cash price (line 1), other charges (line 4), total unpaid balance/amount financed (line 5), and the finance charge (line 6) for deferring payment of the amount financed. Line 10 defines Plaintiffs' obligation to Seller regarding amount and frequency of future payments. These items constitute the extension of credit to Plaintiffs by Defendant. Nowhere on items 1 through 10 is either the word "assignee" or the Security National Bank of Roswell, New Mexico mentioned. The contract purports to be disclosing terms of the transaction and in so doing designates the Seller, Bob's Mobile Home Sales, as the one financing the unpaid balance of $12,662 (line 5) for a charge of $8,101.84 (line 6). By the terms of the contract the finance charge was imposed at the time the credit was extended, the payments were to be made in more than four installments, and the amount financed was less than $25,000. Thus, the past and present definitions of "creditor" were met.

The contract on its face establishes that Defendant is the Owner of the Contract, and is therefore, entitled to receive all installment payments. Under any definition of the word "creditor", from the Law Merchant to the Uniform Commercial Code and the Truth In Lending Act, Defendant qualifies as such. Quite simply, he is the person to whom the obligation was owed. The contract

cannot be read as saying anything other than that the Defendant himself extended credit to Plaintiffs.

The fact that he had planned to assign the contract, as he did in his other installment sales, cannot alter his status as a creditor. An examination of the contract also establishes that the Security National Bank of Roswell never intended to be the Seller or the extender of credit, but to act only as an assignee. This could not have prevented the bank from being adjudged as a "creditor" itself under the Truth In Lending Act which recognizes multiple creditors. The Bank purchased the right or interest of another: in this case, the right to collect money in installments from the Turners. The Bank was a purchaser of chattel paper. Defendant created the monetary obligation with the Turners and sold it to the Bank. TEX. BUS. & COMM. CODE § 9.105(2). Consequently, the Bank required the Defendant to warrant, in the paragraph entitled "Assignment", that the Contract was genuine, legal, valid and enforceable, that all disclosures were made, and, among other things, that the Seller "has no knowledge of any fact which would impair the validity or value of the contract."

The Bank, as an assignee, did not deal with Plaintiffs. No note, loan application, or other instrument of similar nature from the Bank was signed by Plaintiffs.

Defendant has largely ignored the contract and the role it imposes upon him. The transaction is governed by this contract and it is the basis for all indebtedness, yet Defendant argues that it was an afterthought, containing terms which don't mean what they say. The Court is presented with that rare case where the vehicle dealer,

and not the purchaser, claims to not understand or appreciate the terms of the contract.

In so doing, Defendant has sought to shift liability to Delta Corporation, apparently in the hope that the trial court would find that Mr. Gumm was a bystander, at best, or a third party beneficiary, at worst. Appendix A-7, footnote 5. Much of Defendant's testimony centered on Mr. Bob King of Delta Corporation activities: how Mr. King and not Defendant proffered various contracts to the Turners; how Defendant did not know the terms of the contracts, especially the New Mexico contract; how Defendant viewed the transaction as a "cash transaction"; and how Defendant did not receive any placement fee or other unearned remuneration. This testimony might form the basis of an argument that Mr. King was an arranger of credit,[6] but it does nothing to alter Defendant's role as a creditor or arranger of credit.

The cases interpreting the definition of "creditor" in Truth In Lending actions have long noted that the statute expands the traditional definition of creditor:

> ". . . these definitions increase the number of persons generally responsible for making truth in lending disclosures by categorizing as creditors additional persons . . . who did not fit the traditional definition of 'creditor'. Therefore, in some consumer credit transactions, there are multiple 'creditors', a credit arranger and a credit extender . . ." *Meyers v. Clearview Dodge Sales, Inc.*, 539 F.2d 511, 514-15 (5th Cir. 1976).

6. Regulation Z, 226.2(h) (1980), 12 C.F.R. § 226.2(h) (1980) and former Regulation Z, 226.2(f) (1975), 12 C.F.R. § 226.2(f) (1975), contains language indicating that an arranger receives a fee or compensation or has knowledge of the credit terms and participates in the preparation of the contract.

While some evidence was presented by Defendant that Mr. King was an arranger of credit (or in Plaintiffs' view, an agent of Defendant), nothing was presented which took Defendant outside the traditional or statutory definition of "creditor". A creditor is merely one to whom an obligation is owed, and Bob's Mobile Home Sales was the party to whom the debt was owed. He also was contractually entitled to receive a participation fee and anticipated the receipt of same. Appendix C-5. He was directly involved and had a stake in the contract.

Plaintiffs also would state that the argument and the testimony summarized above supports the finding that Defendant was a "retail seller" as defined by the Texas Consumer Credit Code. TEX. REV. CIV. STAT. ANN. Art. 5069-6.01(d).

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

EDWARD W. DUNBAR
MICHAEL C. CROWLEY
1808 State National Plaza
El Paso, Texas 79901
915/532-3638

CERTIFICATE OF SERVICE

I, EDWARD W. DUNBAR, as Counsel of record for Respondents and a member of the Bar of the Supreme Court of the United States of America, hereby certify that three true and correct copies of the foregoing Response to the Petition for Writ of Certiorari have been served upon James F. Scherr, 425 Myrtle Street, El Paso, Texas 79901, in accordance with Rule 33 of the Supreme Court Rules, by placing such copies in the United States Mail. All Parties required to be served have been served.

EDWARD W. DUNBAR

Form Owen 2

NEW MEXICO SECURITY AGREEMENT AND RETAIL INSTALLMENT CONTRACT DISCLOSURE STATEMENT

ACCT. NO. _____ DATE November 1, 1974

PLAINTIFF'S EXHIBIT 9 2-26-87

Buyer (and Co-Buyer) - Name and Address (Include County and Zip Code)	Seller - Name and Address (Indicate Seller's
J.O. & FERN LOUISE TURNER P.O. Box 177 Dell City, Texas - 79837	BOB'S MOBILE HOME SALES 10180 Dyer Street El Paso, Texas 79924

Buyer (which means the undersigned Buyers and Co-Buyers, jointly and severally) hereby purchases from Seller upon the terms and conditions on the face and reverse sides hereof the Motor Vehicle (and other personal property) described below, complete with standard attachments and equipment and other special equipment (all of which is hereinafter called the "Property"), delivery and acceptance of which in good order hereby are acknowledged by Buyer.

New or Used	Year and Make	Series	Body Style	No. Cyl.	If Truck, Ton Capacity	Manufacturer's Serial Number	Present Odometer Reading
USED	73 Monte Carlo	SHR	80X14	MOBILE HOME		773480-81559	

INCLUDING: ☐ Air Conditioner ☐ Radio ☐ Stereo ☐ Automatic Transmission ☐ Power Steering ☐ Power Brakes ☐ Power Seats ☐ Power Windows

Use for Which Purchased: ☐ Personal ☐ Business ☐ Agricultural

DETAILS OF TRANSACTION
(INCLUDING DISCLOSURES REQUIRED BY FEDERAL LAW)

(1) Cash Price*		$ 13,000.00 (1)
Cash Down Payment	$ 1,500.00	
Trade in (See Opposite)	$ None	
(2) Total Down Payment		$ 1,500.00 (2)
(3) Unpaid Balance of Cash Price (Difference between Items 1 & 2)		$ 11,500.00 (3)
(4) Other Charges		
Optional Insurance (Line (e) Opposite)	$ 644.00	
Official Fees	$	
Taxes (Not included in Cash Price)	$ 520.00	
License, Title & Registration Fees	$ 98.00	
Total Other Charges		$ 1,162.00 (4)
(5) Unpaid Balance - Amount Financed*		$ 12,662.00 (5)
(6) FINANCE CHARGE		$ 8,101.84 (6)
(7) TOTAL of PAYMENTS* (Sum of Items 5 & 6)		$ 20,763.84 (7)
(8) Deferred Payment Price (Sum of Items 1, 4, & 6)		$ 22,263.84 (8)
(9) ANNUAL PERCENTAGE RATE		13.49 %(9)

(10) Payment Schedule: Buyer hereby promises to pay to Seller the TOTAL of PAYMENTS (Item 7 above) in 96 payments, the first payment in the amount of $ 216.29 being due on December 15, 1974, and subsequent payments in like amounts on the same day of each successive month thereafter, with the final payment of $ 216.29 being due on November 15, 1982.

(11) BALLOON PAYMENT(S) AND PICKUP PAYMENT(S)

$ NONE on _____, 19____;

$ NONE on _____, 19____

(Insert amount of each payment that is more than twice the amount of any otherwise regularly scheduled equal payment, and list amounts of any pickup payments.) A balloon payment may be refinanced only upon such terms and conditions as the then parties to this contract may agree as of its due date.

(12) DELINQUENCY CHARGES: Buyer hereby agrees to pay a delinquency charge on each payment in default for more than 10 days in the amount of 5% thereof or $5.00 whichever is less, plus attorneys' fees and court costs, incurred by Seller in effecting collection.

(13) SECURITY INTEREST: Seller shall have a security interest under the Uniform Commercial Code in the Property and in the proceeds thereof to secure the payment in cash of the TOTAL of PAYMENTS and all other amounts due or to become due hereunder, and this contract shall serve as a security agreement.

(14) PREPAYMENT REBATE: Buyer may prepay his obligations under this contract in full at any time prior to maturity of the final payment hereunder, and, if he does so shall receive a rebate of the unearned portion of the Finance Charge computed under the rule of 78ths subject to retention by Seller of a maximum Finance Charge of $25.00. No rebate will be made if the amount thereof is less than $1.00.

(15) ADDITIONAL TERMS AND CONDITIONS: The additional terms and conditions set forth on the reverse side hereof are a part of this contract and are incorporated herein by reference.

DESCRIPTION OF TRADE IN

NONE (Year and Make) — $ NONE (Gross Allowance)

(Serial Number) — $ (Amount Owing)

OPTIONAL INSURANCE

Buyer authorizes Seller to obtain the following insurance coverages:

(a) **Automobile Physical Damage Insurance:** Coverages checked below for a term of 24 months (or for such shorter term as the insurer to whom Seller shall apply therefor will provide for the amount included herein) from the date hereof, payable to Buyer or Seller as interests may appear:

☒ Comprehensive ☐ Fire - Theft & Combined Additional Coverage

☐ $ _____ Deductible Collision ☐ Towing & Labor Costs ($25.00 Limit)

$ 526.00 (a)

(b) Credit Life Insurance — $ None (b)
None (Insured Person)

(c) Accident and Health Insurance — $ None (c)
None (Insured Person)

(d) Other Optional Insurance VSI (Specify Kind) — $ 18.00 (d)

(e) Total Cost of Optional Insurance — $ 544.00 (e)

NOTICE: (1) You are not required to obtain the Credit Life and/or Accident and Health Insurance and such is not a factor in the Seller's approval of this credit. (2) You have the right to choose the person through whom the Automobile Physical Damage Insurance required under this contract is to be obtained. ACKNOWLEDGING the foregoing, BUYER requests and authorizes SELLER to obtain each insurance coverage for which an amount is included above.

Buyer _____ Date Nov. 1, 1974

Spouse _____ Date Nov. 1, 1974

(Cost of Insurance to be included only if signed by Buyer)

NOTICE TO BUYER

1. DO NOT SIGN THIS CONTRACT BEFORE YOU READ IT OR IF IT CONTAINS ANY BLANK SPACES.
2. YOU ARE ENTITLED TO AN EXACT COPY OF THE CONTRACT YOU SIGN.

BUYER ACKNOWLEDGES RECEIPT OF A TRUE AND COMPLETELY FILLED-IN COPY OF THIS CONTRACT AT THE TIME OF SIGNING.

Buyer Sign _____

Spouse Sign _____

NOTICE TO BUYER

LIABILITY INSURANCE FOR BODILY INJURY OR PROPERTY DAMAGE CAUSED TO OTHERS IS NOT PROVIDED WITH THIS AGREEMENT. IF YOU DESIRE LIABILITY INSURANCE COVERAGE, YOU SHOULD OBTAIN SUCH COVERAGE FROM AN AGENT OF YOUR CHOICE.

The foregoing contract hereby is accepted by the Seller and assigned to SECURITY NATIONAL BANK OF ROSWELL in accordance with the terms of the Assignment set forth on the reverse side hereof.

Seller BOB'S MOBILE HOME SALES

By _____ Title _____

* INCONSISTENT STATE DISCLOSURES

The terms of disclosure set forth above in the Details of Transaction are made in compliance with the Federal Truth in Lending Act. The following items required by the New Mexico Motor Vehicle Sales Finance Act differ only with respect to terminology and are disclosed at the item numbers indicated: Cash Sale Price at Item (1); Principal Balance at Item (5); and Time Balance at Item (7).

Rev. 6/73

Seller's Copy

ADDITIONAL TERMS AND CONDITIONS

16. ASSIGNMENT
The original Seller may assign this contract and his assignee shall acquire all of his interest in the contract and the Property and shall be invested to all the rights and privileges of Seller hereunder. Buyer hereby agrees not to set up against any assignee any claim or defense of any kind whatsoever, which he might have against the Seller. After Buyer receives notice of any such assignment, Buyer shall make all payments hereunder directly to the holder hereof and the original Seller shall not be the agent of the holder for the transmission of payments or otherwise. Buyer shall not transfer or otherwise dispose of any interest in this contract or the Property without the prior agreement of the holder and payment of all lawful fees.

17. USE OF PROPERTY – WARRANTIES
Buyer shall keep the Property free from all encumbrances, and any amount that may be paid by Seller in release or discharge thereof shall be paid by Buyer to Seller forthwith upon demand with interest at the highest lawful contract rate. Buyer shall not use the Property illegally, improperly or for hire (unless stated herein) and shall not remove the Property from the county of his residence without the written permission of Seller. No representation, promise or warranty, express or implied, has been made with respect to the merchantability, suitability or fitness for purpose of the Property or otherwise unless the same is endorsed hereon in writing or is contained in a separate written instrument signed by the original Seller.

18. RISK OF LOSS – INSURANCE
The Property shall be at Buyer's risk. Buyer shall obtain and maintain at his own expense for so long as any amount remains unpaid hereunder insurance protecting the interests of Buyer and Seller against loss, damage or destruction of or to the Property in such forms and amounts as Seller may require. The inclusion of a charge for insurance herein shall not relieve Buyer of such obligation but only authorizes Seller to attempt to obtain the requested coverages on Buyer's behalf through an authorized agent; provided, if Seller is unable to obtain the requested coverages for the term indicated for the amount included herein, Seller may (i) obtain such coverages for such term, if any, as the insurance carrier to whom Seller shall apply therefor will provide for such amount, or (ii) credit such amount to the final maturing payments hereunder in inverse order of maturity or as otherwise required by law.

If Buyer fails to obtain or maintain such insurance, or fails to furnish satisfactory evidence thereof upon request, Seller may, but shall not be required to, and without prejudice to the rights hereunder if he does not, obtain such insurance protecting either the interests of Buyer and Seller or the interests of Seller only. In such event, Buyer agrees to reimburse Seller for the cost thereof forthwith upon demand together with interest thereon at the highest lawful contract rate.

Buyer hereby assigns to Seller any monies payable under such insurance, by whomever obtained, including returned or unearned premiums, if any. Seller hereby is authorized on behalf of both Buyer and Seller to receive or collect same, to endorse checks or drafts in payment thereof, to cancel such insurance or to release or settle any claim with respect thereto. The proceeds from such insurance, by whomever obtained, shall be applied toward replacement of the Property or payment of the indebtedness hereunder in the sole discretion of Seller.

19. DEFAULT
Time is of the essence of this contract. In the event Buyer defaults in any payment, or fails to obtain or maintain the insurance required hereunder, or fails to comply with any other provision hereof, or a proceeding in bankruptcy, receivership or insolvency shall be instituted by or against Buyer or his property, or Seller deems the Property in danger of misuse or confiscation, or Seller otherwise reasonably deems the indebtedness or the Property insecure, Seller shall have the right to declare all amounts due or to become due hereunder to be immediately due and payable and Seller shall have all the rights and remedies of a Secured Party under the Uniform Commercial Code, including the right to repossess the Property wherever the same may be found with free right of entry, and to recondition and sell the same at public or private sale. Seller will give Buyer reasonable notice of the time and place of any public sale or of the time after which any private sale is to be made. The requirement of reasonable notice shall be met if such notice is mailed, postage prepaid, to the address of Buyer shown at the beginning of this Agreement at least five (5) days before the time of the sale. Upon request, Buyer shall deliver the Property to Seller at a place designated by Seller. Seller shall have the right to retain all payments made prior to repossession and Buyer shall remain liable for any deficiency insofar as allowed by law. Any personalty in or attached to the Property when repossessed, may be held by Seller without liability and Buyer shall be deemed to have waived any claim thereto unless written demand by certified mail is made upon Seller within 24 hours after repossession. Buyer agrees to pay attorneys' fees of 15% of the amount then due plus court costs incurred by Seller in effecting collection, repossession or resale hereunder. Seller's remedies hereunder are in addition to any given by law and may be enforced successively or concurrently. Waiver by Seller of any default shall not be deemed a waiver of any other default.

20. GENERAL
No transfer, renewal, extension or assignment of this contract or any interest hereunder, and no loss, damage or destruction of or to the Property, shall release Buyer from his obligations hereunder. This contract constitutes the entire agreement between the parties and no modification hereof shall be valid in any event, and Buyer expressly waives the right to rely thereon, unless made in writing signed by Seller. Any provision of this contract prohibited by applicable law shall be ineffective to the extent of such prohibition without invalidating any other provision of this contract. This contract shall be governed by the laws of the state of New Mexico.

GUARANTY

For Value Received, each of the undersigned guarantors, jointly and severally, guarantees the prompt and unconditional payment, performance and discharge of all Buyer's obligations under the within contract and covenants that in the event of default in any of said obligations thereunder, to pay upon demand the full amount remaining unpaid thereunder together with attorneys' fees of 15% of the amount then due if placed with an attorney for collection. The liability of undersigned shall not be affected by any extension, renewal or other change in the time of payment of the said contract, or any change in the manner, place or terms of payment thereof, or the release, settlement or compromise of or with any party liable for the payment thereof, or the release or non-perfection of any security thereunder. The holder of the within contract shall not be bound to exhaust its recourse against Buyer or any other person or any security the holder may at any time have before being entitled to payment from the undersigned hereunder. Each of the undersigned guarantors hereby waives notice of the acceptance of this guaranty, and of presentment, demand and protest and notices of non-payment and dishonor, and any other demands and notices required by law, and waives all setoffs and counterclaims.

Guarantor _____ Address _____

Guarantor _____ Address _____

ASSIGNMENT

The Seller named on the face of this contract sells, assigns, and transfers to SECURITY NATIONAL BANK OF ROSWELL (hereinafter called "Bank") his, its or their entire right, title and interest in and to the within contract and the Property described therein and authorizes Bank to do every act and thing necessary to collect and discharge obligations arising out of or incident to said contract and assignment, in order to induce Bank to accept assignment of the contract, the Seller warrants that: The contract, and guaranty if any, are genuine, legally valid and enforceable and arose from the sale of said Property; said Property is as represented to the Buyer named therein; the within contract was complete in all respects and Seller made all disclosures required by law, including the disclosures required by Regulation "Z" (Truth in Lending) prior to the execution thereof by Buyer; the Buyer is not a minor, has capacity to contract and paid the down payment stated in the contract with his own funds, all statements made by or on behalf of the Buyer and furnished to Bank by the Seller are true to the best of the Seller's knowledge and belief, and the Seller has no knowledge of any fact that would impair the validity or value of the contract; title to said Property is vested in the Seller free of all liens and encumbrances and the Seller has the right to assign said title; and a certificate of title so and properly showing a lien or encumbrance for the benefit of Bank or the Seller has been or will be applied for forthwith if permitted by law. If there is any breach, actual or alleged, or regardless of who may assert same, of any of the foregoing warranties, without regard to the Seller's knowledge or lack of knowledge with respect thereto, or Bank's reliance thereon, or the truth of same, the Seller hereby agrees unconditionally to purchase said contract from Bank, upon demand, for the full amount then unpaid whether said contract shall then be, or not be, in default. Seller further agrees that in event Buyer or any other person makes a claim against Bank alleging facts which, if true, would constitute a breach of any of the foregoing warranties, Seller shall assume the defense of such claims and shall indemnify and save Bank harmless from all loss, cost and expenses arising therefrom. In addition, this assignment includes the provisions of the paragraph signed by the Seller below, provided that if none of the paragraphs below has been signed by Seller, this assignment shall not include any of the provisions of the paragraphs below. The liability of the Seller shall not be affected by any extension, renewal or other change in the time of payments of the said contract, or any change in the manner, place or terms of payment thereof, or the release, settlement or compromise of or with any party liable for payment thereof or the release or non-perfection of any security thereunder. Bank shall not be bound to exhaust its recourse against the Buyer or any other person or any security Bank may at any time have before being entitled to payment from the Seller hereunder. The Seller waives notice of the acceptance of this assignment and notices of non-payment and non-performance of the contract and any other notices required by law and waives all setoffs and counterclaims. This assignment shall become effective upon delivery of the within contract to Bank or upon Bank's payment of the purchase price therefor whichever first occurs.

TO: SECURITY NATIONAL BANK OF ROSWELL
WITHOUT RECOURSE AGREEMENT
FOR VALUE RECEIVED, and pursuant to terms of assignment [illegible] the undersigned [illegible] and assigns all of its right, title and interest in and to the within contract and the property described therein, and authorizes and directs the Seller therein named to pay all sums due and to become due thereunder to the order of SECURITY NATIONAL BANK OF ROSWELL, ROSWELL, N.M. (HEREIN CALLED ASSIGNEE), and the undersigned hereby warrants and agrees with Assignee that the within contract and the property described therein are free and clear of all liens, claims and encumbrances of every kind and nature whatsoever, except [illegible] and that the undersigned will warrant and defend the same against the claims and demands of all persons whomsoever. The undersigned represents that the within contract was executed by the Buyer therein named and that the property described therein was sold to said Buyer in accordance with the terms and conditions of said contract, and that all representations made by the undersigned in connection with the within contract are true and correct. The undersigned hereby guarantees the payment of the within contract and all sums due thereunder, and agrees that in the event of default in any payment due thereunder, the undersigned will pay to Assignee, upon demand, the full amount remaining unpaid thereon, together with attorneys' fees of 15% of the amount then due if placed with an attorney for collection. The undersigned hereby waives notice of acceptance of this assignment and notice of default in any payment due under the within contract, and waives all setoffs and counterclaims against Assignee. This assignment shall become effective upon delivery of the within contract to Assignee or upon Assignee's payment of the purchase price therefor, whichever first occurs.

Date _____ 19__
Buyer
Buyer
Seller
Seller

TO: SECURITY NATIONAL BANK OF ROSWELL
ROSWELL, N.M.
(HEREIN CALLED ASSIGNEE)
FOR VALUE RECEIVED, each undersigned, for himself, his heirs, executors, administrators, successors and assigns, hereby sells and assigns to Assignee all the right, title and interest of the undersigned in and to the within contract and the property described therein. The undersigned represents that the within contract was executed by the Buyer therein named and that the property described therein was sold to said Buyer in accordance with the terms and conditions of said contract, and that all representations made by the undersigned in connection with the within contract are true and correct. The undersigned hereby guarantees the payment of the within contract and all sums due thereunder, and agrees that in the event of default in any payment due thereunder, the undersigned will pay to Assignee, upon demand, the full amount remaining unpaid thereon, together with attorneys' fees of 15% of the amount then due if placed with an attorney for collection. The undersigned hereby waives notice of acceptance of this assignment and notice of default in any payment due under the within contract, and waives all setoffs and counterclaims against Assignee. This assignment shall become effective upon delivery of the within contract to Assignee or upon Assignee's payment of the purchase price therefor, whichever first occurs.

Date _____ 19__
Seller
Seller

REPURCHASE AGREEMENT. If you repossess or recover the Property, we will upon your demand pay you the unpaid balance within thirty (30) days, provided this Property is tendered to us or our last address on other records within ninety (90) days after maturity of the earliest payment still unpaid, in default, of any of the notes and obligations and all premiums which become due and payable by you having been applied for this purpose on the earliest maturity date.

Signature of Dealer
By _____
Dealer